COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

WILLIAM D. VOUSBOUKIS,
Appellant

v. Docket No. G1-04-318

TOWN OF SWAMPSCOTT FIRE DEPARTMENT,
Respondent

Appellant's Attorney: Michael Cerulli, Esq.
168 Humphrey Street
Swampscott, MA 01907

Respondent's Attorney: Marc J. Miller, Esq.
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Commissioner: John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, William D. Vousboukis (hereinafter "Appellant"), filed a timely appeal, received by the Civil Service Commission (hereinafter "Commission") on June 30, 2004, claiming that the Respondent, Town of Swampscott Fire Department (hereinafter "Town" or "Department") as Appointing Authority, bypassed him for original appointment as a permanent firefighter for the Department on April 29, 2004. The Town was required to rescind its offer of employment based on the Appellant's failure of the pre-employment medical examination due to a Category "A" medical condition, asthma, which is considered an

automatic disqualifier of Civil Service employment according to the legislatively promulgated and binding Commonwealth of Massachusetts Human Resources Division Physician's Guide Initial-Hire Medical Standards (Revised July 2005) (hereinafter "HRD medical standards").[1] A full hearing was held in the Commission's offices on October 25, 2006. One audiotape was made of the hearing. The parties declined to submit post-hearing briefs and gave oral closing statements, instead.

FINDINGS OF FACT:

Based upon the single document entered into evidence (Joint Exhibit 1) and the testimony of the Appellant, I make the following findings of fact:

1. On April 29, 2004, the Appellant was bypassed for appointment to the position of permanent firefighter with the Department. The Appellant was notified in writing by the HRD of his non-selection from Certification List No. 231007. (Stipulated Fact)
2. The Town's reason for bypassing the Appellant for the position of permanent firefighter was the Pre-Placement Medical Evaluation Report, dated February 3, 2004, of Steven G. Miller, M.D., Medical Director, Medical Consulting of Greater Boston, Inc. The report determined that the Appellant was medically unfit to perform the duties of a firefighter. (Id.)
3. Counsel for the Town stated that the Appellant was an "outstanding candidate" but that the Town was mandated to bypass him solely because Dr. Miller had

[1] The General Court of the Commonwealth required the HRD to create binding medical standards and ratified revisions to those standards in March 2003. Further revisions of the standards were ratified in July 2005. These standards are promulgated pursuant to G.L. c. 31, § 61A and c. 32, § 5(3)(e).

determined that the Appellant had a Category "A" medical condition, specifically asthma. (Appointing Authority's Opening Statement)

4. Category "A", Section (6) (f) (1) (e) is listed as "moderate to severe obstructive pulmonary disease" and is considered an automatic disqualifier of Civil Service employment according to the HRD medical standards. (Administrative Notice)
5. At the time of the Commission hearing, the Appellant was an athletically-built, twenty-four (24) year old construction worker. He was polite and well-mannered. He maintained a respectful tone, spoke clearly and with detail and generally presented himself as a gentleman. I found that it was easy to understand and accept the Town's assertion that the Appellant was an "outstanding candidate" for the position of firefighter. The Appellant was, at all times, credible and unhesitant in his testimony. (Demeanor of Appellant)
6. The Appellant testified that he received the results for his Civil Service written examination in December 2003. Sometime thereafter, then-Fire Chief Laurence J. Gallante advised him that he (the Appellant) was to undergo a pre-employment medical examination on January 6, 2004. The Appellant credibly testified that he was advised by the Chief to simply "show up" at Dr. Miller's office. The Appellant was not told to bring anything, including any documents, with him to the exam. (Testimony of Appellant)
7. Immediately prior to the exam, the Appellant filled out a questionnaire upon which he noted that he had been diagnosed with childhood asthma. Based on this survey, Dr. Miller inquired about the asthma and requested the Appellant's pediatric medical records to learn more about this prior diagnosis. (Id.)

8. The Appellant further testified that he was twenty-one (21) years old at the time of the medical exam. He possessed (and still possesses) an albuterol inhaler for instant respiratory relief but rarely uses it. The Appellant stated that he had been symptom free from asthma for years, including throughout high school. He said that he had only been hospitalized for asthma once, for one night, when he was six (6) years old. This was when he first presented as having symptoms of asthma. (Id.)

9. The Appellant testified that he had been seeing an allergy specialist, Paul J. Hannaway, M.D., only because of reactions he had experienced after eating shellfish. (Id.)

10. The Appellant was medically examined by Dr. Miller on January 6, 2004 and the Physician's Certification of Fitness for the Appellant was signed by Dr. Miller on January 13, 2004. Dr. Miller noted that the following specific sections of the HRD medical standards were not met by the Appellant:

> **Section (6)(f)(1)(e) – Category "A"**
> (6) = biological systems which are components of the Initial Medical Standards for firefighters
> (f) = Respiratory
> (1) = Category "A" medical condition
> (e) = moderate to severe obstructive pulmonary disease
>
> **Section (6)(f)(2)(b) – Category "B"**
> (6) & (f) = same as above
> (2) = Category "B" medical condition (may or may not be a disqualifier for duty as a firefighter)
> (b) = obstructive disease not meeting Category "A" criteria
>
> **Section (6)(f)(2)(h) – Category "B"**
> (6), (f) & (2) = same as above
> (h) = any other respiratory condition that results in an individual not being able to perform as a firefighter

(Exhibit 1)

11. The Appellant testified that he delivered his pediatric records to Dr. Miller's office on February 2, 2004. He said that he never spoke, nor did he attempt to have any personal contact, with Dr. Miller after the exam on January 6, 2004. (Testimony of Appellant)

12. In a Pre-Placement Medical Evaluation Report dated February 3, 2004, Dr. Miller advised the Department, by checking the appropriate box, that the Appellant, as a firefighter candidate, was "Medically unfit (unable to safely perform the essential functions of the above job; performance of the job would pose a direct threat to this applicant or to others)." Dr. Miller expounded upon merely checking the box by writing:

> "Mr. Vousboukis has a pulmonary condition which, in my opinion, is disqualifying for the position in question. He also has a history of developing medical signs and symptoms on exposure to dust and cold air; this latter condition might not be disqualifying in itself, but further supports the determination that he is medically unfit for work as a firefighter (which, of course, requires exposure to dust, cold and other environmental stimulants)."

(Exhibit 1)

13. The Appellant testified that then-Chief Gallante told him on February 9, 2004 that he (the Appellant) had been deemed medically unfit by Dr. Miller. The Chief then advised him to get a second medical opinion on his own. The Appellant happened to have received a report on a February 5, 2004 allergy consultation from his allergist, Dr. Hannaway, the same day. He sought the consultation with Dr. Hannaway because, having revealed to Dr. Miller that he had experienced childhood asthma, Dr. Miller also had told him he could get a second opinion. The Appellant stated that he faxed a copy of the report of Dr. Hannaway to Dr. Miller's office twice and hand-delivered one copy on

February 9, 2004. He further testified that he was dismayed that Dr. Miller would deem him medically unfit after receiving his pediatric medical records but before receiving the report from Dr. Hannaway. (Testimony of Appellant)

14. On page 2 of Dr. Hannaway's February 9, 2004 report, he offers his conclusion that,

> "The patient is currently applying for a Civil Service job at the Swampscott Fire department and the issue of asthma has arisen. In my opinion, his asthma is mild and intermittent and should not interfere with his fire fighting duties. He is able to run two miles every day without the need for albuterol which would imply that his asthma is at best, mild and intermittent."

(Exhibit 1)

15. The Department asserted at the Commission hearing that Dr. Hannaway's report clearly states that the Appellant has mild and intermittent asthma which would still disqualify the Appellant under Category "A" and that, in any case, Dr. Hannaway did not conduct his examination of the Appellant with reference to the HRD medical standards. (Appointing Authority's Closing Statement)

16. G.L. c. 31, § 61A states, in relevant part:

> No person appointed to a permanent, temporary or intermittent, or reserve police or firefighter position after November first, nineteen hundred and ninety-six shall perform the duties of such position until he shall have undergone initial medical and physical fitness examinations and shall have met such initial standards. The appointing board or officer shall provide initial medical and physical fitness examinations. ***If such person fails to pass an initial medical or physical fitness examination***, ***he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination.*** If he fails to pass the reexamination, his appointment shall be rescinded. No such person shall commence service or receive his regular compensation until such person passes the health examination or reexamination. (Emphasis added.)

17. Despite what I find to have been well-intentioned advice from the Chief and Dr. Miller to obtain his own second opinion, the Appellant credibly testified that he was never advised by any party that he could seek a re-examination in accordance with § 61A. Further, administrative notice is taken of the requirement under the HRD medical standards, § 05(1) Medical Standards Examinations and Re-Examinations, that "Medical Standards Examinations and Re-Examinations must be conducted by a physician approved by the standards and wellness community (here, Swampscott) for which the candidate seeks to work." Therefore, the Appellant would have had to be re-examined by a physician provided by the Appointing Authority and not of the Appellant's own choice. (Testimony of Appellant, Administrative Notice)

CONCLUSION:

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First

Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The record in this appeal illustrates a medical evaluation process whereby all parties seemed to want to follow the rules and regulations governing the process. Proper accommodations were made for the Appellant to present additional information although there does not appear to be any information from Dr. Miller indicating that he considered and incorporated Dr. Hannaway's report in his conclusion that the Appellant had an automatically disqualifying medical condition. Both the Chief and Dr. Miller appear to have advised the Appellant to seek his own second medical opinion. While seemingly compassionate and helpful, this advice was, nonetheless, erroneous vis-à-vis the process to be followed pursuant to Civil Service law. Any re-examination or "second opinion" would have had to be conducted by a physician selected by the Appointing Authority.

There is nothing to suggest that the medical conclusions that were issued following the initial medical examination were correct or incorrect. The Commission cannot make that determination. However, even assuming that this process was conducted appropriately to the point in time that Dr. Miller issued his Certification of Fitness of the Appellant, the law is clear that the Appellant was entitled to a re-examination within sixteen (16) weeks of failure of the initial examination.

The plain language of G.L. c. 31, § 61A is unambiguous in this regard. The section states: "If such person fails to pass an initial medical or physical fitness examination, he shall be eligible to undergo a reexamination within 16 weeks of the date of the failure of the initial examination." The Appellant was never advised of this re-examination opportunity, unwittingly or otherwise, from those upon whom he relied for instruction to comply with this process. Consequently, the Appellant was not able to avail himself of an appropriate re-examination.

Having failed to accurately inform the Appellant of the statutory re-examination opportunity, the Town's bypass of the Appellant was not justified. Chapter 310 of St.1993 of the Acts and Resolves of Massachusetts provides that,

> "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

For all of the reasons stated herein, the Appellant's appeal on Docket No. G1-04-318 is hereby ***allowed*** and, pursuant to the powers inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to the Appellant by ordering the Swampscott Fire Department to provide an opportunity for the Appellant to undergo a medical re-examination, in accordance with the HRD medical standards under G.L. c. 31, § 61A, at a time of mutual agreement of the parties but, no later than November 30, 2007. If the Appellant passes his re-examination, the HRD is ordered to place the Appellant's name at the top of the current certification list for the position of Firefighter in the Swampscott Fire Department and each subsequent list, if necessary, until such time as the Appellant has been considered one time for selection to said position. If the Appellant fails the re-examination, his offer of employment will be considered officially rescinded pursuant to G.L. c. 31, § 61A.

Civil Service Commission

_____
John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Guerin, Marquis and Taylor, Commissioners) on September 13, 2007.

A true record. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to:
Michael Cerulli, Esq.
Marc J. Miller, Esq.
John Marra, Esq.